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Exploring the Boundaries of International Criminal Justice

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Chapter 5

Making International Criminal Procedure Work: From Theory to Practice

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After two decades of debate and experimentation it is still not clear whether a definitive model of 'international' criminal procedure has emerged from the ad hoc Tribunals for Yugoslavia and Rwanda (ICTY and ICTR), the Internationalised Tribunals (ITs) or the International Criminal Court (ICC). Initial hopes that the scientific deliberations of the world's leading jurists, followed by a period of rigorous testing in practice, would lead us rapidly to the holy grail of a procedure which was both efficient and rights-respecting, have been dashed. So too have the hopes that the procedures emerging from these new tribunals would enable them 'to set paradigmatic fair trial standards' (Temminck Tuinstra: 2006: 63) and provide a practical model for criminal justice reform everywhere. Instead the tribunals have been widely attacked as 'too costly, too inefficient and too ineffective' (Zacklin: 2004: 545; Higgins: 2007) and have demonstrated a procedural instability characterised by sudden and sometimes damaging changes in direction over a very limited period of time.

This is not to suggest that no progress has been made or to diminish the real achievements of the existing tribunals, especially since, as many early commentators noted, the obstacles to success were daunting (Jorda: 2004). On the contrary, the learning process has been rapid and huge efforts have been invested to correct the mistakes of the early models. But the disappointment of original hopes and the confusion which has arisen as procedure was extemporised, point to the failure of the academic community to provide coherent and principled guidance. What is extraordinary about the development of procedure in the international criminal tribunals is not only the rapidity of change and the constant innovation but the fact that while the rest of the world is moving inexorably towards more adversarial forms of process, the tribunals apparently are moving in exactly the opposite direction.

The task of assessing these new prototypes of international criminal justice is urgent if the whole project of defeating impunity for grave international offending is to survive beyond its infancy. The aim of this chapter is to review some of the available scholarship in order to identify the principles which can help us evaluate what has already been achieved and to plan for the future. It will begin with a brief overview of the history of procedural developments at the tribunals and the so-called 'fall of adversarial criminal process'. It will then review some of the

attempts to theorise these developments from the standpoints both of the sociology of law and, more significantly in this context, comparative law, before concluding that a fresh approach is clearly needed. Based on this analysis, an attempt will be made to suggest some of the principles on which future evaluations and reform of procedure could be based.

The International Criminal Tribunals and 'Inquisitorial Drift'

Existing accounts of the procedural evolution of the international tribunals have relied heavily on the supposed opposition between the 'adversarial' and the 'inquisitorial' methodologies,¹ attempting to show how the original adversarial model has buckled and collapsed under the special demands of international procedure.

The narrative² usually takes 1945 as the starting point, noting that the USA and the UK were able to lay down their own principles of adversarial procedure for the conduct of the Nuremberg Military Tribunals simply because they had physical custody of the leading Nazi defendants. In the same way, 50 years later, the dominant position of the USA as guarantor of the Dayton Accords which ended the Yugoslav conflict, allowed it to do exactly the same for the trials before the ICTY. Judge McDonald, the first President of the ICTY, it was asserted, came to the original drafting sessions for the Rules of Procedure and Evidence (RPEs) with a complete set of rules proposed by a committee of the American Bar Association tucked under her arm and many of these provisions were incorporated directly (Tochilovsky: 2002: 269). According to McDonald 'we merged elements of common and civil law into 129 rules' (2001: 158) but the North American model, as Morris et al. put it, proved 'particularly influential' (1995: 177). The outcome was a strongly adversarial format in which evidence collection and presentation was party-driven (May and Wierda: 1999: 737; Combs: 2002: 70; McClelland: 2002: 1; Tochilovsky: 2002: 269; Fairlie: 2004: 243; Langer: 2005: 857–58). The only significant concession to civil law practice, was the principle of 'flexibility' (Boas: 2001; Murphy: 2010) which permitted the court under Rule 89(c) to 'admit any relevant evidence which it deems to have probative value'. This enabled a court to find any kind of evidence (including double or triple hearsay) admissible.

The first full trial began in May 1996. By this time a second tribunal, the ICTR had been created in November 1994 to deal with the atrocities committed in the Rwandan genocide of that year, adopting almost identical RPEs to those of

¹ Analyses and critiques of this familiar dichotomy are too numerous for convenient citation here but for a recent exposition, see Jackson, J.D. (2005) 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?', *Modern Law Review* 68(5): 737–64.

² This section is largely an updated version of the account given in Vogler, R.K. (2005). *A World View of Criminal Justice*. Aldershot, Ashgate.

the ICTY. A 'second generation' of tribunals, notably including the ICC, which was established after 2002, adopted RPEs based upon the experience of the first generation. It is widely supposed that the original 'adversarial' model quickly proved inadequate for the task, falling victim to the combined impact of three major forces: political, financial and practical.

Among the many political difficulties which beset the new tribunals was one which has been described by Gordon as the 'fragmentation of enforcement' (Gordon: 2007: 672–80). As non-state jurisdictions created by the authority of the international community acting through the Chapter VII powers of the United Nations Charter, and depending on the states parties for funding and logistical support, the ad hoc tribunals were from the outset, chronically vulnerable to pressure. For example, in the *Blasčić* trial before the ICTY, evidence tending to suggest innocence was withheld by the Croatian government until after conviction (Cogan: 2002: 122–3). In the *Todorović* case, a ruling by the Appeal Chamber calling for evidence on the alleged illegal detention of the accused was successfully rejected by the NATO countries, who reminded the tribunal that it relied upon them for the apprehension of alleged offenders (ibid.: 124–7). In the *Baryagwiza* case, the ICTR ruled that the defendant should be returned to the Cameroon since the excessive detention which he had suffered, infringed his rights, pointing out that 'nothing less than the integrity of the Tribunal is at stake' (cited in ibid.: 135). Faced with the consequent non-cooperation from Rwanda, which would have made its work impossible, the tribunal backed down and reversed its ruling (ibid.: 134–6; Fairlie: 2003: 57–8). As Cogan has pointed out, 'silent coercion' may also be exerted by the financially supporting states (2002: 133). This vulnerability, so it is alleged, encouraged the progressive imposition of bureaucratic and authoritarian control mechanisms over the procedure.

Financial problems affected the procedure primarily because the United Nations and the contributing powers, conscious of the vast cost of the tribunals, placed considerable emphasis on the expeditious conduct of cases; an objective which clearly threatened the adversarial character of the trial. A typical ICTY trial lasts for a year. However, the *Kordić* trial occupied 20 months and involved 241 witnesses, 4,665 exhibits, and a transcript of more than 28,000 pages (Combs: 2002: 90). Worse still, the case of *Milošević* was in trial for no less than four years (Hotis: 2006). Of course, international trials are endemically lengthy. As Combs points out, they are often located away from the scene of the original events, making witness appearance difficult, they rely upon a new and complex law featuring ill-defined offence categories which require proof of special elements of intent and they may cover numerous events over a lengthy period of time (2002: 94–102). The tribunals have been subjected to intense pressure from the international community to shorten the process and the blame for much of the delay has inevitably been attributed to the 'adversarial' features of the original model (Bonomy: 2007: 349–50).

Finally, since the judges from civil law countries at any given time outnumber those from common law countries by at least three to one, it is inevitable that

they should find the adversarial rules difficult to operate during their relatively brief secondments and seek to modify them (Tochilovsky: 2002: 270). Judges interviewed by the Expert Group in the ICTY and ICTR have attributed the delay in proceedings primarily to their inability to exercise sufficient directive control (ibid.: 271). Moreover, Pakes (2003) has shown how civil law judges have adopted a much more directing and active role in trials than their common law colleagues and has noted that 'it is not unreasonable that judges might bring their domestic legal culture with them' (cited in ibid.: 313). In the *Akayesu* case before the ICTR, pre-trial disclosure was covertly delivered to a civil law judge to enable him to take a more familiar directing (rather than reactive) role in the proceedings.³ In the ICTY case of *Dokmanović*, the judges called for this material openly in court (Tochilovsky: 2002: 271; Fairlie: 2004: 300–5). Equally, the guilty plea provisions have been successfully subverted by a combination of cultural factors, the misunderstandings of civil lawyers and the failure to achieve consistency in giving sentencing discounts (Combs: 2006).

All these pressures have, so it is argued, contributed to produce a significant 'drift' of the tribunal procedures away from the adversarial. This has occurred not merely as the result of judicial subversion, as noted above but by major reformulations of the rules of the ad hoc tribunals in 1998, 2000 and 2006. Moreover, many of the procedural innovations championed by the ICTY and ICTR have found their way into the rules of the 'second generation' tribunals. Broadly speaking, the changes fall into three categories relating to the position of the judge, the nature of evidence and the position of victims.

The position of the judge, both in the pre-trial and the trial, has changed dramatically since the inception of the international criminal tribunals, from neutral arbiter to directive manager (Meron: 2004: 522–3; Langer: 2005). The ICTY now appoints a pre-trial judge to expedite the procedure, establish a work plan and timetable for case preparation and the filing of documents, in order to identify the points at issue. Both ad hoc tribunals now require pre-trial conferences and strict case-management procedures which, although not unheard of in the common law, nevertheless 'resemble (those) of many Continental countries' (Combs: 2002: 74–9; Ambos: 2003: 10–11). From 2000, a defendant was required to set out his written response to the prosecution case before trial (Boas: 2001: 88). In 2005, the Pre-Trial Chamber of the ICC, over the objections of the Prosecutor, established a status conference to enable it to exercise a measure of directive control over investigations. According to Schabas:

The whole controversy was part of an ongoing struggle between the Office of the Prosecutor and the judges, one that is underpinned by the great cultural debates in comparative criminal procedure. (2007: 257)

3 Schabas, W. (2004) *A Convergence of Two Systems*, Harris Institute, <http://law.wustl.edu/igls/Conferences/Centennial/Universal/videoindex.html>.

There have been repeated calls for further widening of judicial intervention (Harmon: 2007; Jackson: 2009) and even the involvement of the iconic figure of 'inquisitorial' practice; the 'investigating magistrate' (Robinson: 2005: 1046; de Hemptinne: 2007).

As noted above, the directing role of the judge at trial has also been enhanced by the availability of witness statements and the investigative dossier (Tochilovsky: 2002: 271–2) which has enabled the judges to embark on a 'civil law type of examination' (ibid.: 272). There also seems to be increasing evidence that the ICC trial judges will use their powers to call evidence of their own initiative, in the interests of finding the 'truth'; a principle which is expressed as taking precedence over 'fairness'. (Schabas: 2007: 295)

Next, the trial phase has undergone a significant shift away from orality, which Fairlie has described as 'the demise of live testimony' (2003: 48). At the 23rd session of the judges' plenary of the ICTY in December 2000, the judges adopted a new rule entitled 'Proof of Facts Other than by Oral Evidence' (Boas: 2001: 73). A previous rule had already been introduced in 1998 to allow affidavits to be used to corroborate facts in dispute (Fairlie: 2003: 64) and after 2000, deposition evidence could be introduced without 'exceptional circumstances' (ibid.). Equally, under a new rule 92 bis, affidavits could be used in lieu of oral testimony to establish background and peripheral matters (Robinson: 2005: 1041–6; Bassin: 2006: 1777). Even these mild restrictions were abandoned in the *Milošević* case when extensive affidavit evidence was admitted to prove material facts (Fairlie: 2003: 67–9). This development was sanctioned in September 2006, when new rules 92 ter and quater allowed affidavit evidence from persons present in court or from those who were unavailable due to death, disappearance or medical condition to be admitted as evidence of material facts (Gordon: 2007: 683–7).⁴ Predictions made by Fairlie and Boas that much of the live testimony in the prosecution case may disappear, to be replaced as DeFrancia has put it, by 'trial by affidavit' (2001: 1424) are probably overstated but clearly there has been a significant change of approach. As US Judge Wald has suggested, there has been a '180 degree turn from earlier emphasis on the 'principle' of live testimony' (cited in Ambos: 2003: 27). The problem with the creation by stealth of a 'document-dominated' trial in this manner is that many of the safeguards appropriate for such a procedure have not been put in place (Kay: 2004). The 'free-proof' system adopted at the outset has also contributed to the courts being overwhelmed with what Murphy describes as 'evidential debris' (2010: 552). Taken together, these changes represent a significant change in emphasis:

4 Following concerns that witnesses were being murdered to prevent them testifying.

the proceedings now bear a much closer resemblance to the official inquiries of Continental jurisdictions, which are predominantly directed from above, by the court, rather than propelled from below, by the parties. (Combs: 2002: 103)

Finally, although the role of the victim in the ad hoc tribunals was extremely limited, as in an adversarial procedure, '(o)ne of the great innovations of the Rome Statute', according to Schabas (2007: 328) was to allow direct participation on the model of the continental civil party. Moreover, a decision by the Pre-Trial Chamber of the ICC in January 2006, permitted the direct participation of the victim in the investigation stage (de Hemptinne and Rindi: 2006; Stahn, Olasolo et al.: 2006; Zappalà: 2010).

Some commentators, such as Pakes, have welcomed the shift away from adversariality (Pakes: 2003: 319), others, noting the 'obfuscation and delay' of trials such as that of *Milošević*, have gone further, calling for an even more radical strengthening of the inquisitorial features (McClelland: 2002; Tochilovsky: 2002; Nice and Vallieres-Roland: 2005; Jackson: 2009). The outcome has been described as both 'tempered adversariality' (Keen: 2004) and 'cafeteria inquisitorialism' (Fairlie: 2003: 82). Whatever view is taken, it is clear that managerial and bureaucratic considerations have gained very significant ground over due process ones. To make sense of this dramatic procedural revolution, which has been accomplished within a remarkably short time, it will be helpful to consider recent attempts at analysis.

The International Criminal Tribunals and the Sociology of Law Tradition

Authors working within the sociology of law tradition have made an important contribution to the evaluation of the international criminal tribunals, although it must be conceded that this is largely because their work has been adopted by comparative lawyers. There is space here to consider only two of the most important perspectives which have been used in these evaluations; those of Herbert Packer (1968) and Mirjan Damaška (1973; 1975; 1986).

Packer's lasting contribution, which has itself become something of an orthodoxy in criminal justice studies, was to offer two ideal types of criminal justice process; two normative models (1968: 153) which he hoped would help explain the choices which underlie the details of criminal justice practice. The two alternative models were the '*crime control model*' (CCM) and the '*due process model*' (DPM). According to Packer, the CCM 'requires that primary attention be paid to the managerial efficiency with which the criminal process operates to screen suspects, determine guilt and secure appropriate dispositions of persons convicted of crimes' (ibid.: 158). 'If the crime control model resembles an assembly line', continues Packer, 'the due process model looks very much like an obstacle course' (ibid.: 163). This model erects procedural barriers and is based upon a presumption of fallibility and error and a distrust of informal fact-finding methods. Although the

two concepts have been widely criticised (see, e.g. Vogler: 2005: 5–8) they have also been used as a tool of analysis for the international tribunals and international procedural norms (Safferling: 2001: 20; Mansoor: 2005). Warbrick, for example concludes that '(t)he fact that one of the prominent aims of the ... international criminal courts is the vindication of the victims, does make the 'crime control' objective an important aspect of any proposed procedure' (1998: 52–3).

Damaška's pairing of organisational models, which he terms 'hierarchical' and 'coordinate' (1973) has also been used for similar exercises in analysis. Where Packer looked at the normative principles underlying the procedure, Damaška has argued that it is the nature of the institution which operates the procedure which is most important. If a 'hierarchical' authority resembles a pyramid composed of carefully ranked officials, the 'coordinate' authority is a horizontal ordering of non-official participants who derive their social authority from outside the judicial system. From this central distinction between different relations of authority, all procedural forms follow. This taxonomy has been enormously influential, despite its theoretical shortcomings, and recent scholarship has specifically addressed the implications of this approach for the international tribunals (Combs: 2002; Langer: 2005; Jackson: 2008). Swart argues, for example, that the international tribunals represent a hybrid of the hierarchical and the coordinate models but that there is insufficient clarity about the corresponding goals of international criminal justice as well as about the use of procedural means to pursue them. The main task of the tribunals, the establishment of historical facts, he claims, is best served by a hierarchical, problem-solving approach (Swart: 2008).

The International Criminal Tribunals and the Comparative Law Tradition

Whilst these analyses emerging from the sociology of law had been influential, they cannot remotely compare with the impact of comparative law scholarship. In many senses the international criminal tribunals are the specific creation of lawyers and administrators trained in comparative law methodology. For authors such as Roberts, the contribution of the discipline to international criminal justice is both 'invaluable' and all pervading:

By extending comparative method, perspectives and insight into every phase and corner of international criminal justice policy-making and practice, including institutional design, legislation, adjudication, operational policy-making and transborder cooperation in policing, mutual judicial assistance, legal harmonisation, and scholarly theorising, commentary and research. (Roberts: 2007: 365)

The international tribunals represents to many a highly significant consummation for comparative law: not only a grand dynastic marriage between the common law and civil law 'families' but a major rapprochement between comparative

law and international criminal law which, up until 1948 at least, had been highly compartmentalised (Delmas-Marty: 2003: 15).

Nevertheless, it will be argued here that the debates over the creation of the international tribunals and their subsequent procedural instability have revealed starkly the poverty of comparative law discourse regarding criminal justice. In order to understand why the discipline has so signally failed the international community in this way, it is necessary to look briefly at some of its most obvious and fundamental shortcomings. To begin with, comparative law has been dominated until very recently by the analysis of civil law and substantive law models only (Twining: 2007: 80–81), delegating criminal justice and procedural justice to its periphery (Vogler: 2005: 3–5). Worse still, it has been fixated for over a century by neo-Darwinist ‘family’ typologies which have had very unfortunate consequences for the design and assessment of contemporary justice forms. This genealogical approach to categorisation, abandoned long ago in most other disciplines, still dominates the literature and leading comparativists such as Zweigert and Kötz (1998) and De Cruz (2007) continue to typologise legal systems on this basis. Even theorists such as Örtücü, who are anxious to adapt the discipline to contemporary needs, cannot free themselves from this tendency to botanise amongst legal systems, looking earnestly for ‘parentage’:

Today, what is needed is an entirely fresh approach within which legal systems can be classified according to parentage, constituent elements and the resulting blend, and then may be re-grouped on the principle of predominance. (2007: 169–70)

The problems with this approach have been widely discussed (e.g. Twining: 2007: 80–3) and attempts to reconceptualise the legal family as ‘legal culture’ (Nelken: 1997) or ‘legal tradition’ (Glenn: 2004) do not necessarily address the fundamental issues. First it is absurd to regard a ‘legal system’ as a unitary whole and not an amalgam of diverse units and sub-systems, many of which will have been affected by widely differing influences and ideologies at different periods. Second, a taxonomy based upon supposed genetic ‘family origins’ is necessarily ahistorical, ignoring the profound changes which have occurred at different stages of development. By emphasising ‘parentage’ (whatever that may mean in a historical context) the approach diminishes the significance of contemporary change, resulting in sterile and circular debates about ‘legal transplants’. It is not surprising, given the origins of the discipline in the work of nineteenth century comparativists such as Esmein and Saleilles, that the evolutionist conception of legal systems remains unremittably Euro-centric. Although some work emerging from the comparative law paradigm has succeeded in transcending these limitations (Twining: 2007: 79–80), nevertheless the dominant ‘*Grands Systèmes*’ approach, locked as it is into a Victorian concept of human development, cannot possibly meet the urgent needs of communities all over the world for fair and rapid justice in the face of gross violations of human rights.

Recent Evaluations of the International Criminal Tribunals

As indicated above, much of the debate over the success or failure of the international criminal tribunals has revolved around the issue of whether the adversarial (common law) approach or the inquisitorial (civil law) approach has achieved dominance in the tribunals. Given the Darwinian conceptual heritage of the comparative law movement, this is not surprising. However, a further controversy has emerged in recent years. Here the question is whether the outcome of the development of the tribunals is not so much the domination of one model over another but rather a sophisticated amalgam or ‘hybridisation’ of the two. Some authors, such as Delmas-Marty, Ambos and Jackson, amongst others, have hailed the outcome of this process as a distinct and *sui generis* creation, representing a unique synthesis of the best features of the common and civil law models; in short an entirely new type of international ‘super-procedure’.

According to Delmas-Marty, harmonisation is a ‘progressive, evolutionary process’ which should also involve a ‘descending integration (from international law to domestic law)’ and lead to a ‘more pluralist conception of international criminal law’ (2003: 21; 2008). Drawing on Cassese’s opinion in the *Erdemović* case, she explicitly rejects the ‘domination’ thesis in favour of her ‘hybridisation’ approach. Her belief is that the new hybridised international laws, detached from their national origins by the alchemy of ‘combination/fusion’ will have ‘acquired a new dimension, independent of their original meaning’ (2003: 20). These proposed transformations seem, at least on the face of it, to offer a comforting exit strategy from the eternal competition of the adversarial and inquisitorial, supposedly avoiding the dangers of ‘hegemonic universalism based on an imperialist model’ (ibid.: 25).

A similar alchemy has been observed by Jackson in the caselaw of the European Court of Human Rights (ECtHR) which has, he claims:

... developed its own distinctive brand of jurisprudence ... which is transforming rather than merely mixing together the two traditions. ... a vision of participation in the decision-making of the justice system which is rooted both in common law principles of natural justice and due process and in what is known on the continent as *la théorie de la procédure contradictoire*. (2005: 758)

Jackson has extended this analogy to the problem of finding the ‘best epistemic fit’ (2008; 2009) for ICC procedures. His specific proposal is a renewed commitment to the principles of equality of arms and adversarial procedure, coupled with an enhancement of the investigatory powers of the Pre-Trial Chamber to enable it to prepare a single dossier ‘containing all relevant evidence, inculpatory and exculpatory, against the accused’⁵ (ibid.: 38). In this way he hopes to create a model

5 The syntax used here neatly reveals the essence of the problem. Exculpatory evidence can scarcely be used ‘against’ the accused!

which will 'straddle the common law, civil law divide' (ibid.). Unfortunately the implications of such a hybridisation, both practical and theoretical, have not been confronted adequately. Long experience has shown that a dossier-based pre-trial subverts an adversarial trial, whereas equality of arms and adversariality (with their diversity of vision) cannot flourish in a unitary, judge-led enquiry. So far from providing an epistemic 'fit', Jackson's hybridisation suggestions represent a mere bolting together of two trial processes with inconsistent methodologies, objectives and epistemologies.

Similar critiques have been trenchantly expressed by a succession of other authors. Orie suggests that as a result of a 'many-headed compromise' between adversarial and inquisitorial in the ICTY, 'basic elements of the procedure have lost their anchorage in a coherent system' (2002: 1494) while for Warbrick, compromise leads to a fatally unbalanced and 'bastardised process' (1998: 53). DeFrancis talks of the 'pitfalls inherent in blending adversarial and inquisitorial systems' (2001) while Casey (2001: 868) and Zappalà (2003: 15) both point out that, however well they may work in their own national contexts 'they do not mix well together'. Adopting gothic imagery to express their distaste, Gordon, amongst many others,⁶ is alarmed that due process rights have been 'sacrificed on the altar of this artificial union' (2007: 639) while Skilbeck (2010) and Murphy (2010: 573) both see the outcome as a 'Frankenstein's monster'.

Apart from these practical objections, the 'hybridisation' thesis raises a fundamental conceptual problem which has serious implications for any realistic appraisal of the procedure of the international tribunals. Put simply, procedures which are supposedly polar opposites, or 'antimonies' existing in a dialectical relationship with each other (Zappalà: 2003: 15), cannot be amalgamated. As Zappalà puts it, they represent:

... two opposing epistemological beliefs: while for the inquisitorial paradigm there is an objective truth that the 'inquisitor' must ascertain, for the accusatorial approach the truth is the natural and logical result of a pre-determined process. (ibid.: 16)

If the adversarial and the inquisitorial represent conflicting epistemologies, 'hybridisation', makes no sense. Nevertheless, what appears to have been happening in practice in the international tribunals and elsewhere is exactly the kind of illicit amalgamation which should be impossible between two opposites. A slightly puzzled Delmas-Marty, for example, concedes that '(s)uch major divergences would exclude any attempt at hybridisation, if comparative study did not show convergent evolution in practice' (2003: 19). Unfortunately, she doesn't

6 See e.g. Fairlie, M.A. (2003). 'Due Process Erosion: The Diminution of Live Testimony at the ICTY', *California Western International Law Journal* 34(1): 47-84; Fairlie, M. (2004). 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit', *International Criminal Law Review* 4(3): 243-319.

conclude from this that it is the 'oppositional' mode of analysis itself, which is flawed.

There is a further and equally fundamental problem for the 'hybridisation' thesis for which neither Delmas-Marty, nor its other proponents, have given any adequate answer. Like them, she acknowledges but does not address the difficulty that the supposed 'polarity' of laws between the adversarial and the inquisitorial, is necessarily confined to western law and hence, encourages the re-emergence of the obnoxious concept of 'the civilised nations' (ibid.). Safferling, to take one example, begins his influential study on the construction of a new 'international' procedure with the completely unjustified assertion:

The search for an international criminal procedure has to be based on the two main systems of national criminal procedure, namely the Anglo-American and the Continental European traditions. (2001: 5)

He proceeds to carry out this project by an exhaustive examination of individual steps of prosecution and trial as they derive from the two traditions, in order to find the structure which would suit the International Criminal Court (ibid.: 53). His view is echoed by Gordon whose new and 'truly international procedure' is no more than a judicious attempt 'to mix and match the best features that each system (the adversarial and inquisitorial) has to offer' (2007: 707). This is hardly internationalism. Unlike the ECtHR, the international tribunals are intended to be truly global and it is extraordinary that the debates over procedure have remained so Atlanticist and introspective. As a result, the practice of the international tribunals increasingly gives the impression that defendants from the developing world, and in particular from Africa, are being dragged unwillingly before alien, western courts. Delmas-Marty's hope that the laws of the developing world may eventually enter the procedural equation, looks improbably optimistic.

Not all enthusiasts for hybridisation have assumed that the mechanisms for achieving it are unproblematic. Findlay, for example, calls for the clear identification of procedural 'sites for decision-making' (2001: 33) to enable the development of appropriate levels of 'synthesis' and insists that it should take account of the ideologies of the procedural styles (ibid.: 34-37) their personnel (ibid.: 37-40) and methodologies (ibid.: 40-43). While sharing the hybridisation thesis, Ambos adopts a more sensitive approach than Delmas-Marty or some of the others mentioned, to the adversarial/inquisitorial typology. After concluding that the existing terminology is misleading, he opts for a functionalist approach derived from the work of Damaška:

In this sense, the civil law model can more accurately be described as 'judge-led' (*instruktivisch*) or – following Damaška's more structural approach – 'hierarchical', while the common law model is adversarial – prosecution and defence being 'adversaries' – or 'coordinated'. (2003: 4)

These concepts are then used to examine the investigation, the pre-trial and the trial phases of ICTY procedure in turn, dwelling particular on the rules of evidence. His conclusion is that at the level of international criminal procedure, the traditional common-civil law divide has been overcome and replaced with a model which is *sui generis*, exactly as Delmas-Marty had asserted. Moreover, an 'issue-oriented' approach would consider which model of procedure was most appropriate in each of the three different phases of the process (ibid.: 35). Like Delmas-Marty, he predicts a more 'harmonic convergence of both systems', an optimism which is undermined, as was hers, by nagging concerns about the exclusion of other justice systems, notably the Islamic (ibid.: 37).

There are increasing signs, moreover, that some authors are beginning to look beyond the confines of the comparative law typologies. Like Delmas-Marty, Jackson and Ambos, Langer rejects the 'sterile debates about the triumph or defeat of adversarial or inquisitorial models' (2005: 836). However, unlike them, he refuses to identify ICTY procedure as a hybrid between the adversarial and the inquisitorial. Such an approach, he argues, offers little in the way of analytical insight, and instead he proposes the concept of 'managerial judging' which is based upon a claimed structural similarity between the procedure of the ICTY and US civil procedure. Before doing so, however, he offers some interesting reflections on the possibility of consolidating comparative law and sociological concepts, suggesting that '(t)he most promising way to capture these basic distinctions is to describe the adversarial and inquisitorial systems as organised according to two opposing pairs of sub-systems or models' (ibid.: 838). The first opposition is between the 'dispute' and the 'official investigation', while the second is between Damaška's 'coordinate' and 'hierarchical' models (ibid.: 838-47). To Langer the creation of the ICTY was characterised by the competition between the adversarial and the inquisitorial, operating at the levels of culture, legal identity and the distribution of powers and responsibilities. At the outset, the judges chose a dispute model for procedure but a more even balance between the 'hierarchical' and 'coordinate' models for the organisation of authority (ibid.: 868). However, caseload pressures soon brought about 'the fall of adversarial criminal process in the ICTY' (ibid.: 868-74). This evolution, suggests Langer, is very reminiscent of the changes which occurred in US civil procedure in the second half of the twentieth century and which was characterised by the American scholar Resnik as the advent of 'managerial judging' (1982). Langer glosses this theoretical concept to indicate a form of procedure which cuts across the adversarial and inquisitorial, giving a powerful role to the judges to expedite and manage cases without extinguishing the active participation of the parties. He goes on to explain how the introduction of such reforms as pre-trial judges, status conferences, the obligation to file submissions and the move towards written evidence, all indicate the creation of a 'managerial judging' model of process at the ICTY.

Megret, adopting a more sociologically informed approach, proposes a model which he describes as 'becoming international', suggesting that it is the process of adaptation of domestic forms of justice to the 'diversity, distinctness, and

dynamism of its international context' which has become the defining characteristic of international criminal justice (Megret: 2009: 75).

A Three Dimensional Approach to International Criminal Procedure

These authors point the way towards a more strategic analysis of international criminal justice procedure. I have argued elsewhere (Vogler: 2005) that rather than relying on the comparative law typologies, domestic criminal justice is better understood as the arena in which disputes between the three fundamental interests in the social order; the individual, the community and the state are negotiated and resolved. For criminal justice to function successfully it must ensure that none of these legitimate elements is excluded from the procedure or significantly impaired in their ability to represent their particular interests. Procedure, therefore, must facilitate this encounter by ensuring that whereas the interests of the state may well be dominant in the early stage of investigation and pre-trial, the interests of the individual at trial and the community at the level of judgement, none is ever excluded from any stage. In particular I have associated the interest of the individual with adversarial methodology and its ideology of legal rationality, the interests of the community with the methodologies of popular justice and common sense understanding and the interests of the state with inquisitorial methodology and its ideology of forensic investigation and bureaucratic efficiency. By examining their historical and intellectual origins, I have tried to show how each of these different approaches is an essential and legitimate element in any successful system of criminal justice (ibid.).

No analysis based upon domestic criminal justice can easily be transferred to the international level without a good deal of reconstruction. As has been repeatedly asserted, international justice involves much more serious crimes than are usually encountered in the domestic courts and it bears a much heavier political responsibility for conflict resolution and for establishing the collective history of conflict. Nevertheless, the essential role of criminal justice remains the same and post-conflict judicial strategies which have ignored this, have encountered serious difficulties. Excessive adversarialism, privileging the role of the individual, disfigured the trial of Milošević. An excessive reliance on popular justice methodologies in the Rwandan *Gacaca* courts seriously compromised individual rights whereas a failure to regard the state's legitimate interest in retribution undermined the legitimacy of the 'Truth and Reconciliation' approach in South Africa. In order to determine the strategic objectives of the reform process, it may be helpful, therefore, to consider briefly the role of the three elements which I have identified, in developing a legitimate international criminal procedure.

Individual Rights in International Criminal Procedure

The position of individual defendants within the tribunals has been the subject of considerable debate, particularly as a result of the degradation of adversarial party control in the pre-trial and trial, described above. It might be assumed, given that the conduct of trials without fair trial guarantees for the accused can of itself constitute a crime against humanity,⁷ that individual due process rights would be more robustly defended in the international criminal courts than in any other forum (Megret: 2009: 49–58). As the Secretary-General of the UN announced in 1993 in his commentary on procedural issues, it 'is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings'.⁸ Nevertheless, despite the verbatim adoption by both the Statutes of the ICTY/ICTR and the ICC of much of the relevant wording of Articles 9 and 14 of the 1966 International Covenant on Civil and Political Rights (ICCPR), this does not seem to be entirely the case. Two areas, in particular, have given cause for concern.

The application of the right to liberty has dramatised the inadequacies of Article 9 rights of the ICCPR in the context of international proceedings conducted at a distance from the events complained of. Deceit used to lure a defendant across a border in order to effect an arrest⁹ and even kidnap¹⁰ apparently present no problem of abuse of process (DeFrancia: 2001: 1402–4) any more than the ill-treatment of detainees by custody states.¹¹ Provisional release under Article 9(3) of the ICCPR is another acutely problematic area and the Netherlands, host for the ICTY and ICC, has vigorously opposed the idea of defendants being bailed onto its territory (Warbrick: 1998: 57–8; Zappalà: 2003: 115). The burden of proof remains with the defendant and, unlike any domestic jurisdiction (even where grave offences are concerned) there are no specific guidelines on the use and scope of pre-trial detention (Zappalà: 2003: 66–75; Gordon: 2007: 690–91) and possibly a presumption in favour of custody (Murphy: 2010: 456–7).

Equally, it might be assumed that an individual's right to counsel would be exceptionally well protected in the context of international criminal proceedings but again this has proved not to be the case (Temminck Tuinstra: 2010). The right

7 Both Nazi prosecutors and judges (see *United States of America v Alstötter et al.* (1948) 3TWC 1; 6 LRTWC 1; 14ILR 274) and, more recently, Saddam Hussein, have faced such allegations.

8 Report of the United Nations' Secretary-General, submitted to the Security Council 3 May 1993, pursuant to operative paragraph 2 of Security Council Resolution 808, (S/25704, 3 May 1993).

9 *Dokmanović* (IT-95-13a-PT) 22 October 1997.

10 In the cases of *Todorović* (see ICTY Eight Annual Report, UN doc. A/56/352, 17 September 2001, paras 141–4) where the application to challenge was withdrawn and *Nikolić* (IT-95-2-PT) 2 October 2002).

11 *Barayagwiza v Prosecutor*, Cases No. ICTR 97-19 and ICTR 98-44 but see Article 51(1)(d).

is formally provided for in the statutes of both the ICTY¹² and ICC¹³ in terms which reflect explicitly the wording of Article 14(3)(d) of the ICCPR: '(t)o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing'.

However, specific provisions for a functioning bar formed no part of the administrative concept of the ICTY and it took some time before arrangements were made to fund legal teams.¹⁴ The result was a heterogeneous collection of legal practitioners from around the world, many of whom had no experience of the kind of proceedings which were taking place at The Hague, with dire consequences for their clients (Ellis: 2002: 955–9).¹⁵ Some counsel, such as a Serbian member of the Tadić defence team, were allegedly secretly working against the interests of their clients (Zappalà: 2003: 26) while allegations of corruption and 'fee-splitting' raised the horrifying prospect of alleged perpetrators of war crimes profiting financially from the trial process (Ellis: 2002: 964–8). Serious attempts have been made to address these problems and a Code of Ethics was in place by 1997 (Ellis: 2002: 968–72) while a Code of Conduct was developed,¹⁶ together with a Disciplinary Panel. The ICC required the establishment of an Office of Public Counsel for the Defence (OPCD) which is able to provide counsel during the investigation stage to represent the interests of an accused who is not yet aware of the proceedings (Scharf: 2005).

While access to counsel has proved problematic in this context, so too has the right to self representation, which has been progressively eroded since 2001, when it was initially upheld in the *Milošević* case (Jorgensen: 2005; Sluiter: 2005; Hotis: 2006). As a result, although it is clear that the defendant enjoys many of the rights necessary for a fair trial, there are still significant areas, of which the above are merely a sample, in which they fall short of what can be expected in a domestic court.

Community Rights in International Criminal Procedure

The concept of 'community' seems the most difficult to transfer into international criminal justice. At the same time, however, it is the complete absence of any

12 Article 21(4)(d).

13 Articles 55(2)(e) and 67(1)(d).

14 By 2007 the ICTY defence bar comprised 257 members, half of whom were drawn from the former Yugoslavia. McMorrow, J.A. (2007). 'Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY', *Boston College International and Comparative Law Review* 30(1): 139–173.

15 Counsel in the Erdemović case advised their client to plead guilty without understanding either the concept of the guilty plea or the substantive law involved. See *Prosecutor v Erdemović* IT-96-22-A, 7 October 1997.

16 See <http://www.adcity.org/documents/icc-codeconduct.pdf> for a defence commentary.

serious engagement with communities which has formed one of the gravest indictments of the current tribunals (Peskin and Boduszyn'ski: 2003; Arst: 2006; Klarin: 2009). Unless the tribunals can find a practical means of involvement with the communities which they serve, their legitimacy will always be compromised and they will never begin to fulfil their reconstructive mandate.

The main problem of course is that it is hard to identify the 'community' which is specifically offended by international crimes. To involve citizens of the country where the offences have occurred might invite the continuation of hostilities in the courtroom, whereas to include representatives of different countries strains the concept of 'community'. The 'international community', on the other hand, involves states parties rather than real communities. But these difficulties are not insuperable and the Rwandan *Gacaca* jurisdictions have shown clearly that popular participation in the trial of grave crimes is at least possible, even in a deeply traumatised and conflicted community.

The most obvious means of involving and empowering communities directly in the judgement phase of criminal procedure is through the jury, an institution which has been vigorously resisted by academic and judicial elites, particularly since the democratisation of jury practice in the 1970s (Vogler: 2005: 214). This resistance has been even more implacable at the international level. For Safferling, the jury is 'a more than dubious institution' and 'entirely out of the question' for any international court (2001: 216) and Taman (2003) has rejected the role of the jury in any post-conflict society. Powell, on the other hand, argues that the creation of a jury could significantly improve the ICC's flagging legitimacy and prevent abuses of power (2004). She reviews different means to empanel jurors, drawn from either the country where the offences were committed or other countries or mixtures of both. Moreover the jury is not the only means of engaging popular participation in international trials. In terms of formal procedure, lay scrutiny of pre-trial or trial procedure is possible, for example through citizens' panels.

More broadly Drumbi (2007) has attacked the legitimacy of 'individualised liberal-legalist criminal trials' and called for a more pluralised and multivalent approach to transitional justice which would involve popular participation. There are models both in the Township and Village courts (Vogler: 2005: 255-76) as well as in 'Truth and Reconciliation' (Gibson: 2004) and *Gacaca* jurisdictions (Corey and Joireman: 2004; Schabas: 2005) for popular justice which is mobile, much closer geographically to the affected communities and to community values. Combinations of various forms are also possible (Schabas: 2004) as are procedures which encourage restorative justice (Lin: 2005). Legitimate criticism of these existing forms of justice should not undermine the importance of the search for effective forms of community participation in international criminal justice which do not compromise individual and state interests.

States' Rights in International Criminal Procedure

The 'fragmentation' of state authority, which Gordon refers to as the 'disjunction between authority and control' (2007: 672) presents an almost equally challenging obstacle to the creation of a functioning international criminal law tribunal. The accountability of prosecution authorities and their *propria motu* powers in the ICC (Gallavin: 2006: 45-6; Schabas: 2007: 159-66) has been the subject of intense debate, as have the growing managerial powers of the judiciary, especially since the ICTY judges have been required to act as an international legislature to amend the rules which they are themselves to apply. There is a serious failure of separation of powers in the international tribunals (Meron: 2004: 521) and routes of accountability are unclear, particularly in this era of dispersed international sovereignty or 'plurarchy' (Kuper: 2004). This is not the place to discuss the form that such structures should assume but merely to note that the creation of an ever-enlarging civil law bureaucracy within the tribunals (McMorrow: 2007: 152) is no substitute for genuine accountability and the separation of powers.

Equally, it is no substitute for a functioning international police with a degree of operational separation from the prosecution. The tribunals currently exist at a perilous level of international voluntarism, utterly dependent on the goodwill of supporting states. Although the history of attempts to create a global police agency has not been auspicious (Deflem: 2002) and more recent strategies under UN Mandate in Kosovo and elsewhere (Hansen: 2002) to create paramilitary UN forces (Caygill: 2001; Lutterbeck: 2004) raise serious concerns about the accountability and operational styles of international police, nevertheless the transnationalisation of policing is probably an unstoppable process (Sheptycki: 1995) and there is no reason why the tribunals should not take advantage of the new structures being created at the international and regional level.

Conclusion

Attempts to remedy the serious deficiencies affecting the position of each of the three essential participants in the international criminal trial process are not mutually exclusive and advances in one area do not automatically imply retreats in the others. Successful reform, it has been argued here, requires a close look at the purposes of procedure at each stage and a determination to ensure that none of the legitimate actors are excluded from genuine participation, even though involvement cannot always be equal at each point. It also requires sensitivity to the jurisprudential traditions of the region involved and the establishment of regional chambers to reflect those traditions.

The purpose of this chapter has been to suggest that existing comparative law scholarship has failed to offer guidance to the international tribunals in their struggle to develop a truly global concept of justice capable of mobilising universal aspirations for the defeat of impunity for grave crimes. On the contrary, it has

tended to encourage the binary conception of international justice as a conflict between state and individual authority in which enthusiasts for inquisitoriality complain of excessively lengthy trials reduced to near farce by obstructive defendants and lawyers, while enthusiasts for adversariality deplore the growing bureaucracy and inertia. Both collide in a procedure which is becoming more and more complex and separated from the interests of the communities which have suffered the ravages of gross criminality. Indeed, the radical exclusion of popular participation is the most damaging legacy of existing comparative law scholarship and, as I have argued elsewhere, justice without real community involvement is a sham.

In short, the existing comparative law typologies fail to establish either a practical or a normative basis for reform. They cannot do this because they are unable to link the nature and design of the procedure which is operated with the purposes of the tribunals at each stage. It is only by identifying the essential constituencies whose conflicted interests provide the necessity for the existence of international tribunals, and analysing their participation at each stage, that a clearer picture of the type of procedure which we need to develop can begin to emerge.

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